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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOE NELSON DENSON
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in the above mentioned case, entered January 27, 1988.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the lower court decisions directly conflict with several provisions of Rule 11 and *McCarthy*, which provide for adequate assurances that a defendant pleading guilty understands the specific intent elements of the charge?

2. Whether the lower court decisions violated Petitioner's Due Process rights by relying on factual recitations and alleged admissions to support "substantial evidence" for upholding the guilty plea and Petitioner's "understanding" of the intent elements, when Petitioner specifically asserted he did not intend to misapply bank funds under Section 656?

3. Whether the principle that guilty determinations on the basis of jury instructions providing lesser intent elements than the required statutory intent elements violate *Sandstrom* due process rights, should be applied to the analogous situation of a defendant mistakenly assessing his or her guilt in guilty plea proceedings, on the basis of explanations of lesser judicial

intent elements by the district court, rather than the statutory specific intent elements?

4. Whether the lower court decisions correctly construed the intent elements of the Section 656 willful misapplication of bank funds statute, or misconstrued the statute and violated due process by applying or thus equating a lesser level of judicial intent standards with the required statutory levels of specific intent?

5. Whether the Circuit Court's requirement that since the appeal is for Section 2255 relief Petitioner must show non-compliance wth Rule 11, plus additional 2255 prejudice, directly conflicts with *McCarthy* and other circuits finding "inherent prejudice" in a core concern Rule 11 violation warranting automatic reversal?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner Joe Nelson Denson and the United States of America.

TABLE OF CONTENTS

government, when he indicated in the Presentence Report and at Sentencing that he did not intend to misapply bank funds, directly conflicts with *McCarthy*.

2. The District Court's Dismissal of Petitioner's Statement of Innocence of Mind as Nothing More Than 'Supplications For Leniency,' Directly Conflicts with *McCarthy*.

3. The Circuit Court's conclusion that since this is a Section 2255 action, "both" Rule 11 noncompliance, and additional Section 2255 prejudice are required for relief, directly conflicts with *McCarthy* and other circuits.

4. The Circuit Court's conclusion that "In Any Event" the specificity with which a district court "explains" the nature of the charge is generally committed to the court's "good judgment" directly conflicts with the *McCarthy* requirement of reversal.

5. The District and Circuit Courts' conclusions as a "matter of law" that Petitioner "understood" the nature of the charge on the basis of *Colloquy* regarding *factual* recitations of the Government, *as opposed to colloquy* regarding Petitioner's understanding of the *specific intent element*, directly conflicts with *McCarthy*.

III. The District and Circuit Courts' conclusions as a "matter of law" that Petitioner "*understood* the nature" of the *charge* because *"substantial evidence" exists to uphold guilt on the basis of colloquy regarding factual* recitations and admissions, *conflicts* with *McCarthy* and violates due process.

IV. Since the understanding Petitioner had to assess whether to plead guilty was based on the explanation of a lesser level of proof of intent rather than the critical statutory specific intent element, the lower court opinions violate due process and conflict in principle with *Yates, Francis,* and *Sandstrom*.

TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, No. 87-4161, was rendered on January 27, 1988. The unreported opinion is reprinted in the appendix hereto at B.

The Section 2255 Ruling of the United States District for the Southern District of Mississippi (the Honorable Judge William H. Barbour, Jr.) also at issue herein was rendered on March 2, 1987. It is reprinted in the appendix hereto at C.

JURISDICTION

Federal jurisdiction was invoked under 28.U.S.C. 2255 (1949), in that the Petitioner appealed from a final judgment of the United States Court for the Southern District of Mississippi. The District Court ruling was entered against Petitioner on March 2, 1987.

On Petitioner's appeal, the Court of Appeals for the Fifth Circuit entered its opinion on January 27, 1988, affirming the District Court's judgment. Petitioner's Motion for Panel Rehearing and Suggestion for Rehearing En Banc were denied on March 16, 1988. Petitioner's Motions to Recall Mandate and Stay Issuance of Mandate pending application to this Honorable Court for a writ of certiorari were denied on April 26, 1988.

The jurisdiction of the court to review the judgment of the Court of Appeals for the Fifth Circuit is invoked under 28 U.S.C. Section 1254(1) (1948).

CONSTITUTIONAL PROVISIONS, STATUTES INVOLVED, AND FEDERAL RULES OF CRIMINAL PROCEDURE

The pertinent provisions of the United States Constitution, the Willful Misapplication of Bank Funds Statute, 18 U.S.C. Section 656, and the Federal Rules of Criminal Procedure, Rule 11, are set forth in Appendix A hereto.

STATEMENT OF THE CASE

This case is an appeal of the District Court's denial of a Motion to vacate sentencing and withdraw plea, brought under 28 U.S.C. Section 2255 and Rule 11 of the Federal Rules of Criminal Procedure.

The basis of the Motion below, and this Appeal, is that Appellant Denson should be allowed to withdraw his plea and have his sentence vacated, since he **entered the plea without an adequate or accurate understanding of the level**

of intent the government is required to prove to support an 18 U.S.C. Section 656 misapplication of bank funds offense.

At the time Appellant Denson entered his plea he **was under the impression**, based on the explanation of intent to sustain a Section 656 offense provided him by the Court, as well as the explanation provided him by his lawyer and discussions with the government lawyers, that his knowledge, motive, or **specific intent to misapply bank funds didn't matter as far as the government proving a Section 656 offense against him**.

The District Court informed Appellant Denson in pertinent part at the Plea Hearing on March 18, 1986, that. . .

> "**The essential elements of willful misapplication** of bank funds under Title 18, United States Code, Section 656 are as follows. . .**third**, "that the accused willfully misapplied the monies or funds of the bank, and **fourth**, that the accused acted with **intent** to injure or defraud the bank. **The Court went on to explain that in this circuit the intent to injure or defraud the bank is proven by showing a knowing, voluntary act by the defendant, the natural tendency of which may have been to injure the bank, even though such may not have been his motive**." TR. 14-15.

The Affidavit of Petitioner Denson's attorney at the time of the plea and sentencing indicates that. . .

> Throughout the period of time during which I represented Mr. Denson, up to the sentencing in this matter **I advised Mr. Denson that unfortunately the law regarding charges for willful misapplication of bank funds was indictable regardless of knowledge, intent or motive** of such misapplication on behalf of a person so charged. In discussing whether he should enter the plea, **I thus advised Mr. Denson that he could technically have violated the law regarding willful misapplication of bank fund, even if he did not knowingly or intentionally misapply the funds.** TR. 45, par. 2
>
> ...
>
> **In the course of such discussions, Mr. Denson consistently maintained that he did not knowingly or intentionally violate the law in any way.** TR. 45-46, par. 3
>
> ...
>
> Since Mr. Denson's sentencing, it has recently **been brought to my attention** by the lawyers presently representing Mr. Denson that

> the Fifth Circuit has reversed three previous Fifth Circuit cases to now specifically hold". . .that **knowledge is the required** *mens rea* **for a Section 656 conviction**." en banc *United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983). The Fifth Circuit held that **technical violations arising through recklessness are not sufficient to support a charge.** TR. 46, par. 4.

In recounting Petitioner Denson's "VERSION OF THE OFFENSE" the probation officer informed the Court prior to sentencing in the **Presentence Report** which is a part of this record that. . .[1]

> "With further regard to Count I, defendant **Denson told USPO** that he **pled** to this count **because his attorney advised him he was technically guilty**."

The Presentencing Report also recounted to the District Court that Petitioner stated that. . .

> "[i]t **was told to me by the Justice Department lawyers and my lawyer** that what I did could violate the misapplication of funds statute, **so I plead (sic) guilty on that basis but I did not knowingly misuse any funds**. . .TR. III, 30-31.

There was no colloquy at the Plea hearing asking Petitioner Denson **whether he understood the nature of the intent elements** of the Section 656 misapplication of bank funds charge.

Likewise, there was **no colloquy asking** Appellant Denson **whether he understood that it must be proved** by the government beyond a reasonable doubt that **he knowingly intended** to misapply bank funds under the Section 656 *mens rea* specific intent provision. TR. 14-15.

At his sentencing Appellant Denson stated to the District Court that. . .

> **"When it became evident that the charge would probably be filed, and after talking with my attorneys, considering the circumstances, I did enter a guilty plea. There was no intent on my part to violate the law or to harm anyone. I never have intended to create any violation**, and I don't ever expect. . .TR. 10

In the face of Appellant Denson's **remarks at sentencing** that there was **no intention** on his part to commit a Section 656 offense, the **District Court did not conduct any colloquy asking** Appellant Denson **whether he understood that**

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[1]As indicated *infra*, the District Court stated that it also "relied" on the Presentence Report at sentencing.

the government had to prove he knowingly or specifically intended to misapply bank funds to be held guilty. See TR. II, 10.

Petitioner Denson was **not informed** that the **government must prove** under the third element of Section 656, that he **knowingly misapplied** bank funds **with specific intent, until after the sentencing**. Eg., Affidavit of Russell P. Moore, III, (Petitioner's prior attorney), *supra* at TR. 45-47.

Thereupon, a Section 2255 Motion was filed with the District Court which has engendered this appeal.

At the Section 2255 hearing the **government attorney** made the following **extremely significant concessions**, recognizing that the **fourth intent element "explained"** to Petitioner, *supra*, **was** the **lesser "reckless" level of intent, rather than** the *mens rea* **specific intent** requirement that the government must prove he "knowingly" misapplied bank funds:

> Now, that third element is included in the statute, the willfully misapplying. The **fourth element** which is intent to injure or defraud the bank is a **judge-imposed element**. If you look at the history of the statute, your Honor, a predecessor statute had that element in it, and when they changed the statute, they eliminated that element. The judges continued to require that as an element [fourth element] of the crime, and I agree with Mr. Eastland that that continues to be a required element of the crime. But it means less than what it appears to mean at first — at first examination. **That fourth element has given courts a lot of trouble**[2] and in the Fifth Circuit, the courts had determined that **that fourth element, the intent to injure or defraud the bank, means recklessly.** That the act was **done recklessly with a consequence, not that it was done with — knowingly with a specific intent.** A couple of panels got mixed up with the *Welliver* cases, and they took the reckless level of intent that the courts had intended for the fourth element and applied it to the third and the fourth elements together. To quote the third and fourth elements, Your Honor, with the intent element to the crime, the courts intended to discuss them together, never really parceled them out, so that you can examine the intent element, the level of *mens rea* necessary for one element as opposed to the level of *mens rea* necessary for the other element. **So the courts jumbled them up and came up with some cases which said, "Hey, to find**

[2]As evidenced by this appeal, "[t]hat fourth element has given [Petitioner Denson] a lot of trouble [also]."

> **someone guilty of misapplying bank funds, all you have to do is find they acted recklessly." And that was a dangerous stand and because you could have an instance where a bank officer didn't do something knowingly or intentionally. He was just irresponsible, and suddenly he finds himself subject to the criminal sanctions of the law.** The court recognized — the Fifth Circuit recognized that problem, and so they decided *Adamson*, and *Adamson* **made it clear** that the **level of intent necessary** to hold someone **to be convicted** was with regard to **willful misapplication that** the individual **acted knowingly.** *Adamson* **— implicit in** *Adamson* is that **— was the discussion only of the third element** and it wanted to make sure that all of the courts understood **that in examining willful misapplication** that an individual **had to do a knowing act.** That's all *Adamson* stands for.

The **government attorney likewise made the following significant concession at the Section 2255 hearing:**

THE COURT: — that in view of the argument of the defendant, and if we were doing this over again how would you avoid the problem that we are faced with at this time?

MR. JARRETT: Okay. Well, Your Honor, **hindsight is 20/20.** If I were advising the court how to proceed **in light of my — my amplified understanding of the law, I would recommend to the court, if it undertook to provide an explanation of the fourth element**, and by the way, Your Honor, I don't think the law requires you to explain the elements beyond — beyond describing the elements. . .but I would recommend to the court that you take a balanced — a balanced approach, and **if you're going to explain with adjectives the fourth element, that you likewise, use adjectives to explain the third element.**

THE COURT: All right. Then **I explained the fourth element but not the third element; is that correct?**

MR. JARRETT: That's correct... (emphasis supplied)

Upon reviewing Petitioner Denson's contention, that he did not understand the *mens rea* specific intent element or level required for the government to prove a Section 656 charge at the time of the Plea and Sentencing, and that he **would not have pled guilty if he had understood the level of intent required to be proved to sustain a Section 656 conviction**, the **District Court** in its March 2, 1987 Ruling made the **following pertinent findings**:

> "The **essence of the argument of defendant** under both Section 2255 and Rule 35(a) is that Rule 11 and under the due process

clause. . .**his plea** was **not** knowingly and **voluntarily** made **since** the **court did not properly advise him of the essential elements of the crime** under Section 656." Tr. IV.

...

"**The defendant argues** that *Adamson* **requires a** *mens rea* **of knowledge as opposed to recklessness. The court agrees**, and the **government concurs.**" *ID.*

...

The government argues that the Fifth Circuit Law requires that this crime includes **four essential elements. . .third,** that there was willful misappropriation of money or funds of the bank or entrusted to it, and **fourth**, that there was an intent to injure or defraud the bank.

...

defendant argues that the explanation given by the court set forth a lesser *mens rea* than the *mens rea* **of knowingly** as required by *Adamson.*

...

It is clear that *Adamson* discussed and decided that the *mens rea* **necessary in 656 cases is one of knowledge and not one of mere recklessness.** The *Adamson* case **made this discussion in regard to the fourth element** of intent to injure or defraud the bank.

In this case, the court listed each of the four elements from the *United States v. Farrell* case for the defendant. **The court gave no explanation of the third element, that of willful misapplication, but did give an explanation of intent to injure or defraud.** [the fourth element]

The **court feels that willful misappropriation** is a term in **common usage** which would be clear to any educated person, and that it **requires no specific explanation, whether in regard to a jury in-**

> **struction** in a 656 instruction,[3] **or** in a **guilty plea** hearing,[4] at least to a person of Mr. Denson's intellect and education.
>
> ...
>
> **Accordingly,** the **question turns on whether** the **explanation** given by the court as to the **fourth element** of intent to injure or defraud the bank **was improper.**"

The District Court next found that the explanation of the fourth element was an appropriate explanation of the fourth element under Fifth Circuit law.[5]

Importantly, the District Court made additional findings to support its **rationale that Appellant Denson understood the essential intent elements** of the Section 656 charge for the purposes of Rule 11 compliance. Significantly, **the findings were based on reference to colloquy** with Petitioner **regarding asserted facts, as opposed to colloquy regarding his understanding of the essential intent legal elements of a Section 656 charge.**

> **...the defendant attempts to confuse the issue as to whether he knowingly acted and therefore is legally responsible for the fourth**

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[3]To the contrary, as indicated by the government attorney above, and as discussed *infra*, the *en banc* Fifth Circuit Court in *Adamson* found that a **lesser level of intent jury instruction could confuse a jury into failing to realize that to find a defendant guilty under Section 656 the government must prove that the defendant "knowingly" intended to misapply bank funds.**

[4]**As discussed** *infra*, **if due process requires** that a **jury be sufficiently instructed** of the *mens rea* **higher level of intent necessary to be proved to find a defendant guilty** of misapplying bank funds, then a **defendant convicting himself through pleading guilty**, even aside from Rule 11 requirements, **should certainly be given the same sufficient due process understanding of the level of intent that must be proved to establish his guilt.** Cf., *Yates v. Aiken*, S. Ct. No. 86-6060, 42 Crim. L. Rpt., No. 14 (Jan. 12, 1988); *Sandstrom v. Montana*, 442 U.S. 510 (199).

[5]Petitioner does not dispute it is an appropriate explanation of the fourth lesser intent element. Appellant does dispute it as an explanation that confused Appellant, in that it is not the *mens rea* higher level specific intent explanation.

element of intending[6] to injure or defraud the bank by stating at the **sentencing** hearing, **and** also stating in the defendant's version as contained in the **presentencing investigation report** presented to and **relied upon by this court** at the time of **sentencing, that he didn't intend** to violate any law or to harm anyone.

However, at the time of the entry of the plea of guilty the **court called upon the attorney for the government to give a statement of the facts** which the **government** would **expect to be able to prove** if the case went to trial. In that explanation, the government's attorney set forth the heart of the charge against Mr. Denson." *ID.*

Upon reviewing the facts asserted by the government attorney[7] the District Court made the following pertinent legal conclusion:

"**The court concludes as a matter of law** that the **defendant entered his plea freely and intelligently,** fully **understanding that knowledge was an essential to the crime. The court finds that the explanation given by the court[8] is essentially the same** as that set forth in *United States v. Cauble*, 706 F.2d 1322, at Page 1355, **which states, "intent in a Section 656 case** is basically a question for the jury. **It exists if the defendant acts knowingly and the natural**

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[6]The fourth element referred to here by the District Court for "legal responsibility" is the lesser intent "recklessness" standard referred to *supra* by the government, as opposed to the higher intent *mens rea* "knowing" misapplication of bank funds with specific intent. Indeed, the District Court hereby evidences its own confusion. The whole point is that lack of "knowledge" and specific "intent" would mean there was not "legal responsibility" under the "**third** element," the specific intent provision. Yet, the Court was only concerned about reviewing Petitioner's lack of intent statements in the context of the "**fourth** element," the lesser reckless standard element which loosely throws around terms like "knowledge" and "intent" but kicks in with a lesser "natural consequence" "regardless of motive" standard of intent.

[7]Indeed, even the facts asserted by the government are in dispute based on affidavits of the very witnesses that the government referred to in its factual recitation.

[8]As indicated by the District Court itself *supra*, the "explanation" given by the Court was the fourth element "intent to injure" the bank. Likewise, the government conceded *supra*, that the fourth element is the lesser intent level that has caused the courts a lot of trouble.

result of his conduct is or may be to injure the bank.[9] There is no requirement that the accused desire the injury." **That is what the court advised the defendant to be an explanation** of the **fourth essential** element of this crime. **Under the explanation and recitation of the facts** of the case which were agreed to and approved by the **defendant,** this defendant **had to fulfill the essential elements both of willful misapplication and intent to injure or defraud the bank.**[10] There is **no other position** that the defendant **could take in view of the facts** as stated and **agreed to by him.**[11] There **simply is no room** in this case **to argue,** as the defendant wishes to argue, **that the court granted an explanation of a reckless** standard of *mens rea* as opposed to a knowledge standard of *mens rea.*[12]

The defendant's **subsequent references at sentencing** and in his presentence report **as to lack of intent** were **nothing more than** overzealous **supplications for leniency and should be summarily dis-**

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[9]As discussed *infra,* the explanation that a defendant acts "**knowingly and the natural result** of his conduct", is a **lesser level of intent** standard or proof **than** an **explanation** that the **proof required for guilt is that the defendant "knowingly misapply"** bank funds **with specific intent**. See *Sandstrom*, *infra*; *Adamson*, *infra*.

[10]See government concession *supra* which indicates the courts have often erroneously "jumbled up" the fourth element lesser "recklessness" intent standard with the third element higher "knowing misapply" intent standard of proof necessary for willful misapplication guilt.

[11]To the contrary, as discussed below, the admission of facts in pleading guilty does not support a later review to uphold the guilty plea on the basis that "factual guilt" was established by the admission here. The **due process** logic is that where the critical specific intent element was not explained to the defendant, his admission could not constitute an admission of specific intent to violate the law, even if the defendant admitted the facts.

In any event, as discussed below, in **Rule 11 proceedings,** where the specific intent element is not adequately explained to a defendant, that is the end of the inquiry with "automatic reversal."

[12]See **government concession** conceding the **fourth element is the lesser intent level "recklessness"** standard, *supra*.

> **missed.**[13] In reaching this conclusion, this court is aware and was aware at the time of sentencing that the defendant's senior officer at the Mississippi Bank, Pat McMullan, had been sentenced to a term of imprisonment of only six months of incarceration. Mr. McMullan's actions, along with those of this defendant, had led to the downfall of that bank. This **defendant** at the time of the sentencing was **in fact expecting a lesser sentence**[14] than that of Mr. McMullan, and was **in fact expecting probation. The statements made by him at that time and in his presentence report were an attempt to persuade the court to grant probation.**

In due course, Petitioner Denson appealed the District Court's Section 2255 Ruling to the Court of Appeals for the Fifth Circuit. **The Fifth Circuit** thereupon **reviewed Petitioner's challenge and affirmed** the decision of the District Court.

As pertinent to this Petition, the **Fifth Circuit held at the outset that since** Petitioner's appeal was

> "...taken from the denial of a **Section 2255 motion**. Accordingly, **to be entitled to relief, Denson must show both** (1) **failure to comply** with Federal **Rule** of Criminal Procedure **11 and** (2) that it 'constitutes constitutional error,' 'a complete miscarriage of justice,' is inconsistent 'with rudimentary demands of fair procedure', or [results in] prejudice.' (Emphasis supplied).

The **Fifth Circuit** thereupon reviewed the District Court's explanation of "the fourth and final element of the misapplication offense" and initially **concluded** that the District Court's **explanation** that "**intent** to injure or defraud the bank **is proven** by showing a **knowing, voluntary act** by the defendant, the **natural tendency of which** may have been to injure the bank, **even though** such **may not have been his motive**", **was a correct explanation** of the fourth or final element of Section 656.

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[13]**As discussed** *infra*, this Court as well as the Circuits have required that **to dismiss statements of lack of intent** by defendants at plea or sentencing hearings **as nothing more than "supplications for leniency", requires** there be a **record colloquy** between the Court and the defendant **establishing that the defendant understood the essential intent elements** of the charge the defendant was pleading guilty to.

[14]There is nothing in the record to support the statement that Petitioner's actions led to the downfall of the bank and nothing in the record to support the subjective findings that Petitioner was expecting a lesser sentence.

The **Fifth Circuit next found** that "the **District Court also explained the other elements** of the misapplication offense, **including the third element**, which requires 'that the accused [have willfully misapplied the monies or funds of the bank'." (Emphasis supplied). The **Circuit Court rejected** Petitioner's "**contention** that the District Court, by **elaborating upon element (4)** while merely stating element (3), **erred by underemphasizing element (3).**" The Court reasoned that

> "even assuming a contention of this nature could even have merit, it is certainly inappropriate to the facts of this case: **The district court's description of element (4) exceeded its description of element (3) by one sentence only. In any event**, the **specificity** with which the **District Court explains the laws** to the pleading defendant is **generally committed 'to the good judgment' of the Court**, to its calculation of the relative difficulty of comprehension of the charges and of the defendant's sophistication and intelligence. **Denson has not demonstrated any reason to upset the good judgment in the present case**," (emphasis supplied).

The **Circuit Court rejected** Petitioner's **assertion** that the District Court **failed to comply with the Rule 11 requirement of assuring that the Petitioner understood** the nature of the misapplication charge to which his plea was offered. **Importantly however, the Court recognized the requirement "that the pleading defendant must 'possess [] an understanding of the law in relation to the facts '. . .expressed especially in cases in which the trial court accepts a guilty plea without having explained 'the essential elements of the charge** to which [the defendant] pleads guilty.'"

The Fifth Circuit reasoned, however, that "[i]n the instant case by contrast, **the District Court did set out the elements** of the crime charged before accepting Denson's guilty plea." (Emphasis supplied.)

The lower Court next addressed **Petitioner's "related contention**. . .that the **District Court**, once it had completed its explanation of the elements of the crime charged, **failed to ask whether Denson understood the nature of the charge against him**." **The Court rejected Petitioner's assertion** as "oversimplified", **reasoning that**

> "At [the plea] proceeding, **the District Court first explained the law** governing the charge against Denson. **Later**, the District Court **had the prosecution recite the facts it would prove** at a trial. Denson was asked whether he agreed with the prosecution's **recitation of facts** and responded in the affirmative. **At that point, Denson**

> **was in a position to apply the law to the facts**[15], **and Denson was asked to do just that when the District Court then asked whether he was guilty.** Denson responded he was guilty. **This sequence of explanations, questions and responses is substantial evidence**[16] to uphold the District Court's finding **under the applicable 'clearly erroneous standard' that** Denson **understood the nature of the charge** against him.

("law" and "facts" underlined by the Circuit Court).

Finally, the **Fifth Circuit concluded** that

> "[t]he District Court's **finding is further supported** (1) by the **fact that Denson was represented by an attorney** and that **Denson stated** at the plea-taking proceeding that he had **discussed the charges against him with the attorney**[17], (2) **by Denson's mature, extensive education** and sophisticated business experience[18], **and** (3) by the **length and thoroughness of the** instant **plea-taking** proceeding **and concomitant opportunity given Denson to ask questions to dis-**

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[15]As discussed *infra*, how could defendant "apply the law to the facts" and conclude that he did not desire to plead guilty when "the law" regarding the requirement that the government prove he "knowingly" missapply bank funds was not explained to him, and the only "law" explained to him was a lesser intent standard of proof of guilt?

[16]Importantly, as discussed *infra*, **factual** recitations or admissions of facts or implications in the course of pleading guilty **cannot be utilized** to **uphold guilt even in the face of "overwhelming evidence"** by the prosecutor **when the court has failed to adequately assure the defendant's understanding of the critical intent element**. The logic is that **even if the facts are admitted** the **admission does not constitute** factual guilt because they cannot be an **admission of the intent** element necessary to sustain guilt. Indeed, in the concurring opinion in *Henderson* infra, **Justice White notes** that failure to explain the intent element cannot **constitute "harmless error" to support factual guilt** because of alleged factual admissions or implications. *ID.* at 650.

[17]Yes, and as indicated *supra*, the attorney has indicated that he mistakenly advised Petitioner that the lesser intent standard was the standard of proof governing Petitioner's alleged guilt.

[18]As discussed *supra*, the government even conceded that the fourth lesser intent element was the only element explained to Petitioner and "that fourth element has [even] given the courts a lot of trouble."

pell any misunderstanding."[19]

REASONS FOR GRANTING THE WRIT

I.

THE ISSUES PRESENTED IN THIS APPEAL ARE SUBSTANTIAL AND OF SUCH PUBLIC IMPORTANCE THAT THIS HONORABLE COURT'S CONSIDERATION IS WARRANTED. THE DECREASED RESPECT FOR THE CRITICAL NATURE OF SPECIFIC INTENT ISSUES BROUGHT ABOUT BY THE OPINIONS BELOW IN THE CONTEXT OF GUILTY PLEAS, AS WELL AS IN THE CONTEXT OF CONSTRUING THE INTENT PROVISIONS OF THE BANKING STATUTE HEREIN, AFFECTS THOUSANDS OF LITIGANTS, AND GOES TO THE HEART OF THE FAIRNESS AS WELL AS THE EFFICIENCY OF THE CRIMINAL JUSTICE SYSTEM.

The fact alone that the case involves substantial issues regarding guilty pleas and also involves substantial issues regarding intent and proof of guilt for one of the most commonly utilized bank fraud statutes, evidences that the case is exceptionally important to the criminal justice system.

The Court is well aware that the vast majority of prosecutorial efforts to enforce federal criminal laws rely heavily on guilty pleas.

To even further increase the importance of the case, however, the Department of Justice has widely reported that it has made prosecution of crimes involving bank frauds one of the top prosecutorial priorities for the government. STATEMENT OF WILLIAM F. WELD, ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION, DEPARTMENT OF JUSTICE, BEFORE THE COMMITTEE ON GOVERNMENT OPERATIONS, HOUSE OF REPRESENTATIVES, CONCERNING BANK FRAUD (November 19, 1987); see generally, NATIONAL INSTITUTE, The Section of Litigation of American Bar Association, "Banks Under Attack, Criminal Prosecutions...Relating to Failing Banks and Savings and Loans" (1987).

In fact, in the Fifth Circuit alone, the Justice Department has established a Bank Fraud Task Force in Dallas, Texas, claiming the Task Force to be the

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[19]As discussed *infra*, **Petitioner did not understand the nature of the charge well enough** at the Plea and Sentencing hearing **to know that he had "any misunderstanding"!**

largest white collar prosecutorial effort ever unleashed by the government. Eg., LEGAL TIMES, "Justice Assembles Team to Probe Texas Thrifts" (August 10, 1987); see also NATIONAL WEEKLY EDITION, The Washington Post, "The Shadow of the Texas Banking Crisis, It's no longer the state's problem, it's the nation's" (April 4-10, 1988).

Clearly, therefore, intent and proof issues regarding the misapplication of bank funds statute are not going to go away, and potentially thousands of litigants could be affected by the manner in which these critical intent elements are construed, as well as respected in guilty plea and sentencing proceedings.

Under these circumstances, in the wake of the Court's landmark ruling regarding the "intent to defraud" issues surrounding other federal statutes such as the mail fraud statute in *McNally v. United States* and *Carpenter v. United States*, it would seem, in all due respect, that it would be **more just, as well as efficient, to address the intent issues herein now, rather than later.** *See eg.* The National Law Journal, "U.S. Prosecutors Reel in Wake of Mail Fraud Ruling," July 20, 1987; Volume 2, Number 4, Criminal Justice, American Bar Association, "THE CONVICTIONS THAT WEREN'T, The McNally Bombshell" (Winter 1988).

As shown below, **aside from the above practical standpoint of importance, from a substantive standpoint** this appeal represents a **textbook case of the constitutional, statutory, and procedural conflict** and trouble a District and Circuit Court will quickly find themselves in if they drift off course and attempt to justify and sustain a failure to provide a defendant **some of the most fundamentally valued assurances of the criminal justice system:** (1) the **assurance** that a defendant be provided an **understanding of the critical** *mens rea* specific intent levels of proof the **government would be required to prove** to a jury if he did not plead guilty, before accepting a defendant's own determination of or plea of guilt, and (2) the **assurance** that the **government be required to prove the higher** *mens rea* **specific intent levels** of proof required by statutes **to sustain guilt**.

Short of strict adherence to the above assurances, it is clear that we could soon find the abhorrent consequence of American jails being full of potentially "innocent" citizens.

Indeed, the **government** itself **conceded** that **the lesser intent provision explained to Petitioner had caused this very consequence before. The government conceded that the intent provision had "caused the courts a lot of trouble" and that the "danger" of misreading the lesser intent provision was** that **"innocent" banking officers "could find themselves subject to the criminal sanc-**

tions of law," even though they "didn't do something knowingly or intentionally." See Statement of Case, *supra.*

To the contrary, assurances are provided American citizens that before taking the most basic of all human rights, liberty, the government is required to abide by and **sustain proof of the level of intent** required to secure a conviction of guilt, **and** before accepting a guilty plea, **the courts must assure** that the defendant **understands the level of proof of intent** the government would otherwise be required to prove. Accord, *Henderson v. Morgan*, 426 U.S. 637, 647-650 (concurring opinion of Justice White).

As demonstrated below, **these basic American protections** and respect for human freedom **are fundamental to our criminal justice system**, are emblazoned in our federal constitution requiring due process, are embodied in the intent elements of our statutory laws, are further implemented through our Federal Rules of Criminal Procedure, and are justly championed by the decisions of this Honorable Court.

Indeed, **this Court has recently reaffirmed its determination to strictly require the government to meet its proper level of statutory proof of intent** through such decisions as *McNally, supra* (requiring adherence to statutory elements to prove intent to defraud under mail fraud statute) and *Yates v. Aiken,* S. Ct. No. 86-6060, 42 Crim. L. Rpt., No. 14 at 3027. (Jan 12, 1988). See also, THE WALL STREET JOURNAL, Editorial, (July 1987) (editorial reviewing *McNally* and emphasizing that the Supreme Court should require closer adherence by the courts to specific intent provisions).

For example, **in emphasizing the importance of issues relating to statutory intent elements** the Supreme Court **as recent as January of this year found in** *Yates, supra*:

> **"*Sandstrom v. Montana* made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in *Winship* on the critical question of intent in a criminal prosecution.** 442 U.S., at 521. **Today we reaffirm the rule of *Sandstrom* and the wellspring due process principle from which it was drawn."**

Yates, supra, at 3027.

> **Our opinion in *Francis* explained why a challenge of this kind is supported by the Federal Constition.**
>
> **'The Due Process Clause** of the Fourteenth Amendment **'pro-**

> **tects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime** with which he is charged.' ... This **'bedrock, axiomatic and elementary [constitutional] principle,'** *id.*, at 363, **prohibits** the State from using **evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime... The prohibition protects the fundamental value determination of our society,'** given voice in Justice Harlan's concurrence in *Winship*, **that 'it is far worse to convict an innocent man than to let a guilty man go free.** 397 U.S., at 372. See *Speiser v. Randall*, 357 U.S. 513, 525-526 (1958).' 471 U.S., at 313.

Yates, supra at 3026-3027.

As shown below, **the direct departure of the District and Circuit Court below from well established constitutional, statutory, and Federal procedural precepts and policies assuring that statutory intent elements will be strictly respected before taking away one's freedom, demands no less attention and no less bold pronunciations of this Court in this case** to "protect the most fundamental of values of our criminal justice system."

The **opinions below**, in all due respect, represent an unwarranted and unjust venture into territory that **can only heighten the possibility that innocent citizens may be held guilty of charges without sufficient proof or understanding that the government must prove beyond a reasonable doubt that they specifically intended to commit illegal acts.**

Aside from the degree of fundamental unfairness that such policy injects into the criminal justice system, such loose respect for intent provisions in plea proceedings and for statutory intent provisions can only result in a decrease in the efficiency of the judicial system, as the number of post sentencing collateral attacks to judgments correspondingly increase.

II

THE DECISIONS BELOW DIRECTLY CONFLICT WITH NUMEROUS RULE 11 REQUIREMENTS RECOGNIZED BY THIS COURT TO ASSURE THAT A DEFENDANT PLEADING GUILTY UNDERSTANDS THE SPECIFIC INTENT PROVISIONS THE GOVERNMENT WOULD OTHERWISE HAVE TO PROVE BEYOND

A REASONABLE DOUBT TO ESTABLISH HIS OR HER GUILT.

The **District Court** itself as well as the **government concedes** that the **specific intent element** of the misapplication of bank funds statute was **not "explained" to Petitioner**, and the **Circuit Court** opinion **recognized** that **reversal** is **appropriate "especially in cases** in which the **trial court accepts a guilty plea without having explained 'the essential elements** of the charge **to which** [the defendant] **pleads guilty.'"** See Statement of Case, *supra*.

Under the circumstances, it is clear, therefore, that the opinions below directly conflict with this Court's decisions recognizing that valid Rule 11 proceedings must assure that a defendant pleading guilty understands the specific intent provisions the government would otherwise have to prove beyond a reasonable doubt, to establish his or her guilt.

Even dissenting opinions attempting to uphold guilty pleas in non-federal, non-Rule 11 proceedings involving intent questions pertinent to whether a guilty plea should be upheld, **have acknowledged** that "...*McCarthy v. United States, supra*, at 471, **expands** the notion of **'voluntariness' to include the concept** that a **defendant must have an 'understanding** of the essential elements of the crime charged, including **the requirement of specific intent...,' in order for** a **plea** in the federal courts **to be valid** under Fed. Rule Crim. Proc. 11..." *Henderson v. Morgan*, 426 U.S. 637, 653-654 (1976) (Justice Rehnquist dissenting). "*McCarthy* **extended** the **definition of voluntariness to include** an **'understanding** of the essential elements of the Crime charged, including the requirement of **specific intent**..." id. at 652-653; (see also concurring opinion of Justice White at 649-651).

As demonstrated below, therefore, it is not surprising to find the lower court decisions at odds with numerous Rule 11 requirements and policies recognized by this Court to assure that the defendant pleading guilty understands the specific intent provisions of the statute with which he or she is charged:

1. The District Court's Failure to Conduct Record Colloquy with the Petitioner to assure that he understood the specific intent element of proof required of the government, when he indicated in the Presentence Report and at Sentencing that he did not intend to misapply bank fundings, directly conflicts with *McCarthy*

At the outset, the District Court's decision **departs from a fundamental policy**

of Rule 11 recognized in *McCarthy* that the District Court should have conducted **colloquy** with Petitioner **to determine if he understood the specific intent element, when he asserted lack of intent.**

> **"Rule 11 is described to eliminate any need to resort to a later fact-finding proceeding 'in this highly subjective area.'** ... The Rule **'contemplates that disputes as to the understanding** of the defendant and the voluntariness of his action **be eliminated at the outset** ...'
>
> ...
>
> There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.
>
> ...
>
> He pleaded guilty to a **crime** that **requires** a **'knowing and willful' attempt to defraud** the government. . .**yet**, throughout his sentencing hearing [and in the Presentence Report in Petitioner Denson's case] **he. . .insisted** that **his acts were. . .committed without** 'any **disposition** to deprive the United States of its due.' **Remarks of this nature cast considerable doubt on the Government's assertion that the petitioner pleaded guilty with full awareness of the nature of the charge.**
>
> ...
>
> ...**it is certainly conceivable that he may have intended to acknowledge only** that he in fact owed the Government the money it claimed **without necessarily admitting that he committed the crime charged; for that crime requires the very type of specific intent that he repeatedly disavowed.**
>
> ...**petitioner's own replies to the Court's inquiries might well have attested to his understanding of the essential elements** of the crime charged, including the requirement of **specific intent**, and to his knowledge of the acts which formed the basis of the charge.
>
> ...
>
> **We thus conclude that prejudice inheres** in a failure to comply with Rule 11, for noncompliance **deprives the defendant of** the Rule's **procedural safeguards** that are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding

> that a defendant whose plea has been accepted in violation of Rule 11 **should be afforded the opportunity to plead anew** not only **will insure that every accused is afforded those procedural safeguards, but also will help reduce the great waste of judicial resources required to process** the frivolous attacks on guilty plea convictions that are encouraged, **and are more difficult to dispose of when the original record is inadequate.** It is therefore **not too much to require that, before sentencing** defendants to years of imprisonment, district judges **take a few minutes necessary** to inform them of their rights and **to determine whether they understood the actions they are taking.**

ID. at 469-471

The Fifth Circuit itself previously followed the above policy. In *United States v. Punch*, 709 F.2d 889 896-897 (5th Cir. 1983), the Fifth Circuit approved the underlying policy in *McCarthy*, finding, as pertinent to this case that:

> a judge cannot personally assure himself that a defendant understands the nature of the offense with which he is charged without ensuring first-hand that both he and the defendant know what those charges consist of. Where some of the elements of the offense remain unstated, misunderstandings are likely to occur. (citation omitted) '**Whenever the Rule 11 disclosure is incomplete**, there is a **possibility of misunderstanding**; and **whenever this possibility is present** and the defendant before sentencing claims that it was a reality, **the courts should be loathe to deny an accused his right to trial** (citation omitted). We believe that such a misunderstanding occurred here. **In response to** the judge's question whether he acknowledged that the Government had **strong proof** of his guilt, **Punch said**: "In a way, but **I had no knowledge** of that, you know'? **This statement should have alerted the judge** to the fact that he and Punch **were on different wavelengths. Since Punch was not properly informed that knowledge was an element of the offenses**, and **maintained his innocence** throughout the proceedings, **his response may plausibly be construed as revealing his ignorance either that knowledge was an element of the offense** to which he pled guilty, **or that the Government had the burden of proof on knowledge .**
>
> **At the very least, his answer reveals considerable confusion on his part. Had the judge responded** to Punch's hesitation **by explain-**

> **ing** to him **that the Government bore the burden of proving** beyond a reasonable doubt that he **knowingly committed the alleged offense**, or by asking Punch to explain what he meant by his response, **he could have cleared up the misunderstanding which caused Punch to seek to** withdraw his plea shortly thereafter.

Likewise, the Fifth Circuit in *Canady v. United States*, 554 F.2d 203, 204-205 (5th Cir. 1977), also a Section 2255 case, held that:

> Like the case at bar, *McCarthy*, involved **statements of innocence of mind** made by the defendant. . .**at sentencing**
>
> ...
>
> In *Sierra v. Government of Canal Zone*, 5th Cir. 1977, 546, F.2d 77, 80, we stated that **when** *mens rea* **is a crucial element of the offense**, 'the district court **must determine, on the record** by personally addressing the defendant, **that the defendant understands the nature of the mental element.**
>
> ...
>
> That **[McCarthy] case makes clear** that **compliance with the requirement that the judge address a defendant to determine his understanding** of the charge **is the touchstone for disposing of post-conviction attacks such as Canady's.**

2. The District Court's Dismissal of Petitioner's Statement of Innocence of Mind as Nothing More Than 'Supplications For Leniency,' Directly Conflicts With *McCarthy*

The District Court's **rejection of Petitioner's statement as to lack of intent as nothing more than supplications for leniency, without record colloquy** regarding Petitioner's understanding of the specific intent element of the statute, **directly conflicts** with *McCarthy*.

This court in *McCarthy* found that:

> "**petitioner's own replies** to the court's inquires **might well have attested to his understanding** of the essential elements of the crime charged, including the requirement **of specific intent**
>
> ...
>
> Similarly, it follows that **if the record had been developed properly**, and if it demonstrated that petitioner entered his plea freely and intelligently, **his subsequent references** to neglect and inad-

vertence **could have been summarily dismissed as nothing more than overzealous supplications for leniency.**

We thus conclude that **prejudice inheres** in a failure to comply with Rule 11...

ID. at 471. Accord, *Canady,* supra. (5th Circuit quoting *McCarthy).*

3. The Circuit Court's conclusion that since this is a Section 2255 action, "both" Rule 11 noncompliance, and additional Section 2255 prejudice are required for relief, directly conflicts with *McCarthy* and other circuits.

As demonstrated above, the **"prejudice inherent"** in Petitioner's **lack of understanding of the critical specific intent provision** of the statute to which he pled guilty, **requires that he "be afforded the opportunity to plead anew."** *McCarthy, supra* at 471-472.

Under the **fifth circuit's requirement created in this case** Petitioner must show "both" Rule 11 noncompliance, and additional Section 2255 prejudice in direct conflict with *McCarthy* and other circuits.

As the **First Circuit,** for example, has recognized, when the Rule 11 requirements allegedly unsatisfied are central to the policy considerations of Rule 11, **"both"** of the above requirements **are not necessary for relief.** *Mack v. United States,* 635 F.2d 20, 24 (1st Cir. 1980). *See also, Punch, supra* at 896-897 **(fifth Circuit previously recognizing "... failure to address one of Rule 11's core concerns** was **inherently prejudicial,** and **obviated the need for further scrutiny.")**

In this, a case in which Petitioner's lack of understanding of the specific intent provision, is obviously "central" to his understanding of the nature of the charge, the "inherent prejudice" is sufficient for relief. The Fifth Circuit is therefore in direct conflict with *McCarthy* and the First Circuit. The circuits have interpreted *McCarthy* as follows:

> The Supreme Court has distinguished between the standard of review of a collateral appeal of a Rule 11 violation and a direct appeal, holding that a guilty plea is not subject to collateral relief when all that is shown is a formal violation of Rule 11. See *United States v. Timmreck,* 441 U.S. 780, 785, 99 S. Ct. 2085, 2088, 60 L.Ed2d 634 (1979). **Since the requirements allegedly unsatisfied in the instant case are so obviously central to the policy considera-**

> **tions underlying Rule 11,** *Timmreck* does not apply. Here, **we follow the holding of *McCarthy* that "prejudice inheres in a failure to comply with Rule 11."** *McCarthy v. United States,* 394 U.S. at 471, 89 S.Ct. at 1173.

Mack, supra at 24. (1st Cir. 1980).

4. The Circuit Court's Conclusion, That "In Any Event" The Specificity With Which A District Court "Explains" the Nature of the Charge Is Generally Committed to the Court's "Good Judgment" directly Conflicts With the *McCarthy* Requirement of Reversal

Where there has been **no "explanation" of the essential elements of the charge,** *McCarthy* plainly requires reversal, allowing the Petitioner to withdraw the plea of guilt.

Indeed, **rather than leaving** the "specificity" of "explanation" **to the discretionary "good judgment"** of the District Court, where the court fails to address a core concern of Rule 11, the Fifth Circuit has previously repeatedly recognized, for example, that

> ". . .entire **failure** by the court to address **a core concern** was **inherently prejudicial** and **required automatic reversal** of the conviction. . ."

United States v. Punch, supra at 895. (referring to *United States v. Dayton,* 604 F.2d 931 (5th Cir. 1979)

The **opinion below is thus in direct conflict with** *McCarthy*, as well as prior Fifth Circuit caselaw.

Indeed, while the Fifth Circuit in Dayton, *supra*, noted that explanation of "simple charges" may be committed to the "good judgment the court," it held that

> "**charges of a more complex nature,** incorporating esoteric terms or concepts **unfamiliar to the lay mind,** may **require more explication**. In the case of charges of extreme complexity, **an explanation of the element of the offense like that given the jury in its instructions may be required**. . ."

Dayton, supra at 938.

Thus in considering the "Standards of Review" for "values lying at the heart

of the Rule's concerns," and **following *McCarthy*, the Fifth Circuit in *Dayton* ruled**

> "**Nor, logically can we see how an error inherently prejudicial can be viewed as harmless under any standard of review**. Thus, we are **bound to conclude**, as we do, that such a **failure by the trial court to address** any one or more of the rule's three **core concerns as occurred in *McCarthy* requires automatic reversal**."

ID at 939; *accord, Canady, supra.*

5. The District and Circuit Courts' Conclusions as a "Matter of Law" That Petitioner "Understood" the Nature of the Charge On the Basis of *Colloquy* Regarding *Factual* Recitations of the Government, *As Opposed To Colloquy* Regarding Petitioner's Understanding of the *Specific Intent Element,* Directly Conflicts With *McCarthy*.

As previously indicated in the Statement of the Case, the District Court and Circuit Court, **specifically relying on** the "explanation" provided of the fourth intent element and the **factual recitation** the government "agreed to" by Petitioner, "**conclude[d]** as a matter of law that the defendant entered **his plea freely and intelligently,**" with an "**understanding of the nature of the charge**."

Importantly, the District Court and Circuit Court's reliance on factual recitations agreed to by Petitioner at the plea proceeding are in direct conflict with *McCarthy*.

Upon considering that "**Rule 11 directs** the district judge to inquire whether a defendant who pleads guilty **understands the nature of the charge** against him", **this Court in *McCarthy* noted** that even though the District Court determined there was a factual basis for the plea

> "**because** of the Government's concession at oral argument that the judge **did not inquire whether petitioner understood the nature of the charge**, and because of our holding that any compliance with Rule 11 is reversible error, we **need not consider the Government's contention that the record adequately supports** the Court of Appeals' **conclusion** that the district judge satisfied himself that there was a **factual basis for the plea**."

ID., note 9 at 464.

While, as discussed *supra*, the Court's have since read *McCarthy* as requiring "automatic reversal" only where there is noncompliance with a central or core concern of Rule 11 and *McCarthy*, **it is clear that the court's failure to inquire whether Petitioner understood the specific intent provision** and the District **Court and government's conceded failure to explain the third element, specific intent** provision, **constitute core concern noncompliance with Rule 11**.

Under the above *McCarthy* ruling and rationale, **therefore**, it is **inappropriate to conduct further "factual" inquiry in attempt to support a "factual basis" for the guilty plea**, upon finding that assurances that Petitioner understood the specific intent provision have not been complied with. *ID.*

Moreover, as discussed below, **to determine that Petitioner understood the nature of the charge on the basis of a review of factual recitations** by the government of what it would allegedly prove if the case were tried, **or review of admissions** by Petitioner to recitations of facts by the government, **violate due process where, as here, Petitioner has not admitted he "intended"** to violate the misapplication of bank funds statute.

III.

THE DISTRICT AND CIRCUIT COURTS' CONCLUSIONS AS A "MATTER OF LAW" THAT PETITIONER "*UNDERSTOOD* THE NATURE" OF THE *CHARGE* BECAUSE "*SUBSTANTIAL EVIDENCE*" EXISTS TO UPHOLD GUILT ON THE BASIS OF COLLOQUY REGARDING *FACTUAL* RECITATIONS AND ADMISSIONS, *CONFLICTS* WITH *McCARTHY* AND VIOLATES DUE PROCESS.

The District Court concluded that under the explanation of the fourth element and the Petitioner's admission to the government's recitation of facts, "**[t]here is no other position** that the defendant could take **in view of the facts.**"

To the contrary, as recognized by the Fifth Circuit itself in *Punch, supra,* Petitioner's **assertions of innocence of mind could very well mean that he didn't understand** that "knowledge" was a required element, or that the **government had to prove beyond a reasonable doubt that he knowingly intended** to violate the statute.

Indeed, the above recognition of the "possibility of a **misunderstanding**" in *Punch*, as opposed to an "understanding of the nature of the charge", is

particularly illuminating in this case, as the very element the District Court stated it "explained", has been conceded by the government as not to be the specific intent element.

Even more importantly, however, the Supreme Court has specifically held that

> ...if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. . .because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

McCarthy, supra at 466.

Thus, reliance on factual statements to support the guilty plea plainly cannot remedy the Court's failure to explain and determine that Petitioner understood the third element specific intent legal provision.

Indeed, even in non-federal, non-Rule 11 cases where compliance with Rule 11 is not required, this Court has specifically held that regardless of the amount of factual evidence the government claims it can prove, and regardless of admission to factual statements in pleading guilty, failure to explain the specific intent provision to which the defendant pleads guilty nevertheless violates due process, requiring reversal.

Where the specific intent element of the statute to which the defendant was pleading guilty in *Henderson v. Morgan*, 426 U.S. 637, 644-645 (1976) was not explained[20] the Supreme Court held that:

> "We assume, as Petitioner [the government] argues, that the prosecutor had overwhelming evidence of guilt available...Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense.
>
> ...
>
> There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respon-

[20]While the specific intent element was not even listed in *Henderson*, Petitioner respectfully submits that is of no consequence in the context of "due process" in this case. Petitioner did not understand the specific intent provision herein, and as discussed *supra*, the fourth element explanation upon which the district court bases the factual inquiry has been conceded by the government to even cause the courts a lot of trouble because of their own misunderstanding of the element.

> dent **had the requisite intent.**[21] Defense counsel did not purport to stipulate to that fact.[22] **They did not explain to him that his plea would be an admission of that fact;** and he made no factual statement or admisson necessarily implying that he had such intent.[23] **In these circumstances it is impossible to conclude that his plea to the unexplained charge...was voluntary.**

The Honorable Justice White, joined by Justices Stewart, Blackmon, and Powell further explained the rationale of the above due process ruling of the Court in a **concurring opinion.** Importantly, the opinion **first notes** that **in "our system of criminal justice" "factual guilt** of a defendant **such that he may be deprived of his liberty** consistent with the Due Process Clause" **may only be established** (1) by **a jury** "conclud[ing] after trial that the **elements** of the crime have been **established beyond a reasonable doubt," or** (2) "by the defendant's own solemn **admission** 'in open court that he is **in fact guilty** of the offense with which he is charged." ID at 647-648 (Emphasis supplied by Justice White.)

Importantly, however, the concurring opinion recognizes that the basis of the ruling in *Henderson* is that "**factual guilt" cannot** be used to **support** a **guilty plea where "the defendant did not expressly admit that he intended" the violation "such intent being an element of the crime** for which he stands convicted." *ID* at 649. **Justice White noted,** as pertinent to this case, that "[p]lainly, a **defendant cannot 'intelligently' reach** that **conclusion [of guilt] if he does not know the elements** of the crime to which he is pleading and **therefore does not know what the State has to prove**; and his ignorant **decision to plead guilty under such circumstance** is **not a reliable indication that he is in fact guilty,"**[24]

---

[21]The **trial court** here **admitted it did not explain the third element,** the **specific intent element of section 656.**

[22]As indicated *supra*, to the contrary defense counsel has indicated Petitioner constantly maintained he did not knowingly or intentionally misapply bank funds.

[23]Indeed, as discussed *supra*, Petitioner maintained in the Pre Sentence Report and at sentencing that he did not intentionally misapply bank funds.

[24]As pertinent to this case, Justice White also distinguished a third type of situation upholding a guilty plea, "intelligent", rationale pleas though professing innocence. As with Justice White's note distinguishing *Henderson* from *North Carolina v. Alford*, 400 U.S. 25 (1970), this is not a case where the defendant was explained "the difference" between the different levels by the court or his lawyer. *ID.* note 1 at 648-649.

Accordingly, in direct conflict with the **lower courts'** unconstitutional conclusion of "**substantial evidence**" to support the guilty plea, the **Supreme Court** has held that "**overwhelming evidence**" based on factual admissions **won't even support a guilty plea**, consistent with due process, **where the defendant did not admit intent**. *Henderson, supra* at 644.

IV.

SINCE THE UNDERSTANDING PETITIONER HAD TO ASSESS WHETHER TO PLEAD GUILTY WAS BASED ON THE EXPLANATION OF A LESSER LEVEL OF PROOF OF INTENT RATHER THAN THE CRITICAL STATUTORY SPECIFIC INTENT ELEMENT, THE LOWER COURT OPINIONS VIOLATE DUE PROCESS AND CONFLICT IN PRINCIPLE WITH *YATES, FRANCIS* AND *SANDSTROM.*

There can be no doubt that the lower court opinions present substantial questions and conflict in principle with the "bedrock, axiomatic and elementary", "wellspring due process principle" applicable to "the critical question of intent in a criminal prosecution", holding that guilt should not be assessed with lower intent elements of proof, than the required statutory specific intent element. *Yates, supra* at 3026-3027.

Indeed, in emphasizing the importance of strict adherence to statutory specific intent elements to assess guilt, this Court recently recognized that utilization of lesser intent elements of proof **conflicts with** "the **fundamental value determination of our society**. . .that 'it is **far worse to convict an innocent man than to let a guilty man go free.**'" *ID.* at 3027. Cf., *McNally, supra* (requiring strict adherence to statutory intent elements for mail fraud)

Petitioner respectfully submits that the instant case is a textbook example of why the above principles applied to jury instructions should likewise be applied to uphold due process in situations, as here, where lesser intent elements are explained to a defendant for the analogous purpose of assessing his or her own guilt in guilty plea proceedings.

Indeed, the district court and government concede that the fourth element, rather than the third element, was explained to Petitioner, and the government concedes the fourth element is the judicial lesser intent element that has even confused the courts into applying a lesser intent instruction to juries, other than the required statutory higher level of specific intent[25]. See Statement of Case,

[25]Indeed, in all due respect, it is a job for Congress to change the intent levels, rather than the Courts. *McNally, supra.*

supra.

Yet, somehow, miraculously, we are to expect Petitioner to have understood the *mens rea* intent level with such an explanation, when the courts couldn't, and the government even admits that the misunderstanding, as here, resulted in innocent people going to jail. See Statement of Case, *supra*; *Yates, supra*; *Francis, supra*; *Sandstrom, supra; United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983) (en banc): *Dayton, supra* at 938 (en banc) (Fifth Circuit even recognizing that "charges of a more complex nature" in a Rule 11 context "may require more explication" and "in charges of extreme complexity, an explanation like that given the jury in its instructions may be required.")

V.

THE LOWER COURT OPINIONS MISCONSTRUE THE INTENT ELEMENTS OF SECTION 656 AND EQUATE THE LESSER INTENT PROVISION WITH THE SPECIFIC INTENT PROVISION IN VIOLATION OF DUE PROCESS.

At the outset, there can be no doubt of the importance of properly construing the intent elements of Section 656, as banking fraud is currently one of the top priorities of the government. See Argument I, *supra*.

Moreover, the intent provision of Section 656 cries out for this court's attention and intervention, as the government itself acknowledges that 656 intent provisions have repeatedly caused the courts trouble, and have caused innocent bankers to go to jail. Statement of Case, *supra*; see also, Villa, John K., **Banking Crimes**, Section 3.02[4][a], at 3-23 to 3-24, Clark Boardman Company, Ltd. (1987); Smalley, John A., "**Intent to Injure or Defraud: The Courts Play a Legal Shell Game**", 9:2 U. Dayton L. Rev., 339 (1984).

In the instant case there can be no doubt the District Court misconstrued the intent elements of Section 656. Indeed, contrary to the Fifth Circuit's own en banc decision in *Adamson, supra*, the court ultimately even equates the fourth element explanation, the explanation the government conceded as the reckless explanation, with the higher level specific intent explanation required by Section 656. See Statement of Case, *supra*.

Indeed, the court evidences its own misunderstanding of the intent elements by attempting to justify the "knowing", "natural consequence", fourth element intent element explanation, as encompassing the same elements of a "knowing" specific intent explanation for the higher statutory specific intent elements. *ID*.

The Court's interpretation misconstrues the intent elements of Section 656, therefore, and likewise, directly conflicts with the *Sandstrom* due process cases, *supra*, barring equating lesser intent elements with specific intent elements of proof. *Accord*, *Adamson, supra*. (en banc Fifth Circuit construing Section 656 and concluding lesser intent provisions of proof violate due process and conflict with *Sandstrom*).

CONCLUSION

For all the foregoing reasons, Petitioner Denson respectfully submits that this Petition should be granted.

Alternatively, at a minimum, this Honorable Court should exercise its supervisory authority to summarily dismiss, or remand, to prevent the clear injustice and conflict with this Court's decisions demonstrated herein.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Hiram C. Eastland, one of the attorneys for Petitioner herein, am a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of May, 1988, I served copies of Petitioner's foregoing Petition for a Writ of Certiorari on the party hereto by mailing three copies of said document by United States mail, in duly addressed envelopes, with postage prepaid, to each of the following persons:

Honorable Charles Freed, Solicitor General,
Department of Justice,
Washington, D.C. 20530

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I further certify that all parties required to be served have been served.

Hiram C. Eastland, Jr.